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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 9, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions
--MM Docket No. 92-264

Dear Ms. Searcy:

Please find enclosed on behalf of the National Association of Telecommunications Officers and Advisors, et al., an original and 11 copies of the Comments of the National Association of Telecommunications Officers and Advisors, et al., filed in MM Docket No. 92-264.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,

Bruce A. Henoch

Attachment

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Before the
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Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions	)	

TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

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February 9, 1992

TABLE OF CONTENTS

SUMMARY

The provisions of the 1992 Act that are the subject of this rule-making are an important part of the Act's consumer protection scheme. The ownership and cross-ownership limitations and anti-trafficking provision seek to limit the ability of cable operators and programmers to engage in profiteering and anticompetitive practices that lead to increased cable rates and reduced services for subscribers.

The Local Governments agree with the Commission that franchising authorities should enforce the anti-trafficking provision and that cable operators should submit a certificate of compliance with the statute, together with sufficient evidence to reasonably establish such compliance. In order to carry out this enforcement responsibility and the responsibility to evaluate the proposed transfer under the franchise agreement and applicable law, franchising authorities should have full access to all information that the franchising authority deems necessary or appropriate in connection with the proposed transfer. Access to a broad range of relevant information is crucial if the franchising authority is to responsibly carry out its obligation to protect the public interest when considering a transfer of control request under the franchise agreement and applicable law.

The Local Governments believe that conditional waivers of the anti-trafficking provisions are inconsistent

with the statute. Cable operators should be required first to seek franchising authority approval of the proposed transfer before seeking a waiver.

Transfers of ownership interests in cable systems should be subject to case-by-case review by the franchising authority to determine whether an actual change of working control has occurred. The Local Governments further believe that the purposes of the anti-trafficking provision would best be served by requiring that each cable system which is part of a proposed transfer transaction meet the 3-year holding period of the statute.

The Local Governments support the Commission's proposal to continue in effect the recently-issued MMDS and cable cross-ownership rules and to extend those rules to SMATV and cable systems.

The Local Governments further believe that subscriber limits and channel occupancy limits are important in preventing undue concentration in the cable industry. The Local Governments believe it is appropriate for franchising authorities to enforce channel occupancy limits and to require cable operators to certify compliance with such limits. To enable franchising authorities to enforce these limits, the Commission should require cable operators to list each programmer in which they have a cognizable interest under the FCC's attribution rules. The Commission should publish this information and update it quarterly.

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Washington, D.C. 20554

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions	MM Docket No. 92-264

TO: The Commission

COMMENTS OF THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, THE NATIONAL
LEAGUE OF CITIES, THE UNITED STATES
CONFERENCE OF MAYORS, AND THE NATIONAL
ASSOCIATION OF COUNTIES

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, the "Local Governments") submit these comments in the above-captioned proceeding.

I. INTRODUCTION

The Commission is seeking comment on implementation of Sections 11 and 13 of the Cable Television Consumer

Protection and Competition Act of 1992 ("1992 Act"), which deal with ownership and cross-ownership limitations and the prevention of trafficking in cable franchises. These provisions are part of the package of provisions in the 1992 Act that were designed to benefit cable subscribers by limiting the ability of cable operators and programmers to engage in certain profiteering and anticompetitive practices that lead to increased cable rates.

As Congress found, the more competitive the market for video services, the lower rates will be for consumers. This is the rationale behind the enactment of subscriber and channel occupancy limits as well as the limits on ownership of MMDS or SMATV operators. These limits are designed to foster competition and diversity, and to reduce the ability of large cable operators and operators affiliated with cable programmers to unduly interfere with normal competitive market forces that tend to keep cable rates for consumers reasonable.[1]

The anti-trafficking provision attempts to deal with a different problem that has resulted in artificially high rates. Trafficking in cable television franchises frequently leads to higher rates without any increase in services because of the significant debt typically incurred by the purchasing entity when acquiring the system.

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1 S. Rep. No. 92, 102d Cong., 1st Sess. 47 (1991) ("Senate Report").

Congress imposed a 3-year holding period following acquisition or initial construction of the system to ensure that, during the holding period, consumers will not face increased rates due to a transfer of control or ownership.

In these comments, Local Governments agree with the Commission that the franchising authority should be primarily responsible for monitoring and enforcing the anti-trafficking provision. A cable operator should be required to provide a certificate to the franchising authority that any proposed sale or transfer of a cable system complies with the provision, together with sufficient evidence to reasonably establish such compliance.

In order to carry out their enforcement responsibilities, franchising authorities should be given broad authority to request any information that the franchising authority deems relevant to its inquiry under the statute. Similarly, for purposes of determining whether a transfer complies with the franchise agreement and applicable law and is otherwise in the public interest, franchising authorities should be able to obtain from the parties all information that is required by the franchise agreement or applicable law or that the franchising authority deems necessary or appropriate in connection with the transfer determination.

In addition, the Commission's rules should ensure that all transfers or sales involving a transfer of actual working control are subject to the 3-year holding provision.

II. DISCUSSION

A. Sales of Cable Systems

Section 13 of the 1992 Act imposes a 3-year holding period following acquisition or initial construction of a system, during which the owner is not permitted to sell the system except under three limited exceptions. Congress' intent in enacting this requirement was to prevent "profiteering transactions" which "adversely . . . affect cable television rates or service in the community served by the transferred cable system."[2]

The anti-trafficking provision is an integral and important part of the consumer protection scheme devised by Congress in the 1992 Act. Trafficking in cable franchises -- that is, acquiring and selling franchises for profit without building or operating the system over the long term -- inevitably results in higher rates for cable customers. Systems are frequently burdened with substantial debt and other expenses in connection with a transfer of control. The need to meet large debt service obligations requires expanded revenues, which typically

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[2] H.R. Rep. No. 628, 102d Cong., 2d Sess. 119 (1992) ("House Report").

translates into significant rate increases without any corresponding increase in service. Thus, the consumer ends up bearing the costs of the transfer of ownership. To protect consumers from such unwarranted rate increases, the Commission should construe the anti-trafficking prohibition broadly and adopt rules that allow local franchising authorities to ensure that cable operators adhere strictly to the provision.[3]

1. Local Franchising Authorities Should Have Primary Responsibility for Monitoring and Enforcing the Anti-Trafficking Provision.

The Local Governments agree with the Commission that franchising authorities should have primary responsibility for monitoring and enforcing the anti-trafficking provision. As the governmental entity closest to and most familiar with the day-to-day operations of the local cable system, franchising authorities are in the best position to evaluate the particular factors involved in each transfer. Further, under the vast majority of franchise agreements and/or applicable state or local laws, cable operators are required to obtain franchising authority approval of any transfer or sale of the system or interests in the system. Consonant with the Act's fundamental framework of a

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3 See House Report at 119 ("The Commission should craft regulations adopted pursuant to this subsection in a manner that permits the kinds of transfers described among affiliated entities, but does not create a broad or general exception to the 3-year holding period requirement.").

regulatory partnership between the federal and local governments, it would be duplicative and inefficient for the Commission to reexamine the same facts in order to enforce the anti-trafficking provision.

Indeed, the 1992 Act contemplates that the enforcement responsibilities under Section 13 will be coordinated with the responsibility of franchising authorities to approve transfers pursuant to local franchise agreements and applicable law. Transfers and sales have historically been locally-made decisions that raise many of the same issues that arise in the initial franchising process, such as the identity of the true owner or controlling person or group of persons, the ability to offer and maintain high quality service throughout the franchise area, track record of performance in other jurisdictions, financial and technical qualifications, the ability and willingness to operate the system so as to meet the community's cable-related needs and interests, and the ability to comply with the terms and conditions of the franchise agreement. Transfers also raise additional issues related to the operation of the system, such as the ability and willingness of the proposed transferee to correct breaches under the existing franchise agreement, to update the cable system, or to bring the system into compliance with applicable requirements. The answers to these and other issues are crucial if the franchising authority is to ensure that the proposed transferee is capable of providing quality service at reasonable rates throughout the franchise area.

Congress understood that franchising authorities must retain the right to consider such issues in connection with transfer requests in order to protect the public interest:

> The Committee did not intend that the 3-year holding period requirement expand or restrict the current rights that any franchise authority may have concerning approval of transfers or sales.

House Report at 120. The legislative history goes on to emphasize that the provision "is not intended to limit, or give the FCC authority to limit, a franchising authority's right to grant or deny a request for approval of a sale or transfer, in its discretion, consistent with the franchise and applicable law." Id. at 120-21.

2. Cable Operators Should Be Required to Submit Certifications Accompanied By Evidence Demonstrating Compliance With the Statute.

The Local Governments also agree with the Commission that the anti-trafficking provision would best be implemented by requiring cable operators to certify that a proposed transfer or sale of a cable system complies with the provision. The burden should be on the operator seeking to transfer the cable system to demonstrate either that the 3-year holding period has expired or that the transfer is permissible under one of the exceptions listed in the provision. Thus, the certification should be accompanied by sufficient evidence to reasonably demonstrate that the transfer or sale complies with the required holding period or is eligible for one or more of the statutory exceptions. The FCC rules should be clear that a franchising authority may request additional information or clarification from the operator that the franchising authority reasonably believes is relevant to a determination that the proposed transfer is in accordance with the statute and otherwise satisfies the requirements of the franchise agreement and applicable law.

3. The 3-Year Holding Period Should Commence When Control of an Operating System Begins.

A major question regarding implementation of the anti-trafficking provision is what standards should be used to initiate the running of the 3-year holding period. Section 13 states that no cable operator may sell or transfer the system within 36 months following either "the acquisition or initial construction of such system by such operator." The goal of the holding period is to protect cable customers from adverse effects on rates or services that can occur when cable franchises are sold in "profiteering" transactions. House Report at 119.

Congress has determined that customers of a cable operator that has been granted a cable franchise should be entitled to expect at least 3 years of service from that operator. With regard to owners of initially constructed systems, this means that the holding period should not commence until after the completion of construction in the franchise area and service is offered and actually available throughout the franchise area. Allowing the holding period to begin running earlier, such as when the franchise is issued or some other time prior to completion of construction, would not be consistent with the purpose of the statute. The customers in such a situation would be no better off than if the holding period did not exist, since they would still be exposed to the possibility of higher rates without having had the benefit of receiving the service publicly committed at the time a franchise agreement had been entered into by the franchising authority in the public interest.

In the case of an already-existing system, the holding period should begin on the date on which the owner first assumes actual working control of an operating cable system <u>and</u> such exercise of actual working control has been approved by the franchising authority and the Commission, as appropriate.[4] (See discussion below at 13.) The

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[4] A franchising authority usually approves a transfer of control by an ordinance passed by the local government. Under such circumstances, the date of "actual working control" approved by the franchising authority should mean the effective date of the ordinance.

Commission should ensure that, in this situation as well, the customers in the franchise area have the full benefit of having an operating system for three years before it is eligible to be transferred.

4. The Commission's Rules Should Allow Case-By-Case Determinations of Transfers of Control.

The Commission asks for comment on what constitutes a transfer of ownership in a cable system for purposes of the anti-trafficking provision, and how such determinations should be made. The Local Governments agree with the Commission that the standard of actual working control contained in the broadcast rules, 47 C.F.R. § 73.3555, is appropriate. Under these rules, a transfer for the purposes of the anti-trafficking provision would be any transfer of "actual working control of the cable operator in whatever manner exercised." See Note 1, 47 C.F.R. § 73.3555. Working control of a corporation can change based on the transfer of even a small percentage of stock depending on such factors as the number of shareholders, the percentage held by each shareholder, or the percentage of stock held by the largest shareholders.

In order to implement this test, the Local Governments urge the Commission to adopt a rule that, upon a transfer of five percent (5%) or more of the stock or other ownership interests in a cable system, there is a rebuttable presumption that an actual transfer of control has taken place and all such transfers should be subject to review by the franchising authority. This presumption places the burden on the cable operator to show that the transfer does not result in a change in actual working control in the system. Further, the presumption is pegged at a level that minimizes the risk that a de facto change in control could occur without any review by the franchising authority for statutory compliance.

5. Resolution of Complaints Should Be Handled at the Local Level.

The Local Governments would be willing to undertake the responsibility of handling any complaints arising out of the anti-trafficking provision at the local level. In that the franchising authority will usually have already examined all of the relevant facts in detail when deciding on requests for approval to transfer the system, it would be inefficient for the Commission to have to duplicate the inquiry on the same transaction. Further, complaints should first be handled in accordance with locally-established procedures or any dispute-resolution provisions set forth in the franchise agreement. To the extent that the complaint cannot be resolved through the procedures set forth in the applicable law or regulation or in the franchise agreement, the complaint should be resolved by the courts.

6. There Should Be No Exception for MSO Transfers.

The Commission in the NPRM inquires as to how MSO transfers should be treated under the anti-trafficking provision. According to the NPRM, it is unclear whether the 3-year holding period must be satisfied for each system owned by an MSO. Commenters are asked to indicate whether the Commission should establish separate procedures for determining compliance with the anti-trafficking provision for transfers or assignments of MSOs. The Local Governments believe that it is irrelevant whether one system is being transferred or 1,000. The effect of a transfer can vary greatly, enhancing one community while subjecting subscribers to higher rates and lower service in another. As such, from the perspective of the individual cable customer, the same problems and risks -- for example, higher rates and reduced services -- could occur regardless of how many systems are being transferred in the aggregate. Allowing separate procedures for MSO transfers could have the result of subjecting customers of the system being sold or transferred to two or more major system transfers within 36 months. Had Congress sought to provide an exception for such a situation, it could have included it among the exceptions listed in the provision. Because of the hardships that it would cause to consumers, and because Congress provided no such exception, MSO transfers should be subject to the 3-year holding period for each individual system to be transferred.

7. Sales of Municipally-Owned Systems Should Be Exempt From the Anti-Trafficking Rule.

The Commission asks in the NPRM whether municipally-owned systems should be exempt from the anti-trafficking provision. While the Local Governments will comply with the rules adopted by the Commission, they believe that municipal ownership of cable systems does not present the same potential for abuse that is present with private ownership of a cable franchise. Unlike privately-owned systems, municipally-owned systems are subject to public review. Further, while some private operators may be inclined to sell the system to make a quick profit, franchising authorities typically are motivated to enter the cable business for the purpose of providing quality cable service to local residents at reasonable rates rather than to make a profit. Therefore, the typical motivation for those involved in franchise trafficking, which is profiteering through sales transactions, is not present in municipally-owned systems. Moreover, there has been no history or evidence of trafficking abuses by municipally-owned systems. Thus, the anti-trafficking provision need not apply to publicly-owned systems.

8. Conditional Waivers Should Not Be Permitted.

The Local Governments believe that, when requesting a waiver of the 3-year holding requirement from the Commission, cable operators should be required to first obtain the approval of the franchising authority if required under the franchising agreement or applicable law. The statute does not authorize conditional waivers; indeed, such waivers contravene the plain statutory language. The statute provides that "the Commission shall not waive such requirements unless the franchise authority has approved the transfer" (emphasis added). This statement unambiguously requires prior approval of the franchising authority before a waiver can be granted by the Commission. Further, the Commission should not have to use its limited resources to consider waivers for transfer requests that may subsequently be denied by a franchising authority pursuant to the terms of the franchise agreement or applicable law.

9. The Commission Should Confirm That Local Governments Have Broad Power to Request All Information Necessary or Appropriate to Review a Transfer Request.

The Commission requests comments on the types of information franchising authorities should be able to request when considering applications to approve a transfer when the transfer occurs after the expiration of the 3-year holding period and if such approval is required under the franchise or applicable law. First, the Commission should recognize that franchising authorities currently have the power to obtain any information permitted or required by the franchise agreement or applicable state and local law in order to properly exercise their responsibilities with respect to transfer of control proceedings. The Commission's regulations should acknowledge and confirm that franchising authorities are so empowered and may exercise all rights granted under the franchise or applicable law in this regard.

Second, franchising authorities should have the power under the statute to request and obtain a broad range of information that is necessary or appropriate to determine whether a transfer should be permitted under the terms of the franchise agreement or applicable law and is otherwise consistent with the public interest.

As described above, when a request for approval of a transfer is received, the franchising authority must consider such issues as the identity of the proposed transferee's controlling person or group and whether the proposed transferee will provide adequate service throughout the franchise area, comply with the existing franchise agreement, and correct breaches under the existing agreement. (See discussion above at p. 6). These and other issues that the franchising authority must consider require that the franchising authority have broad powers to fashion and enforce appropriate information requests, based on the specific facts surrounding the proposed transfer and the existing franchise. The fact that the FCC may require certain information should have no impact on the franchising authority's ability to seek the information that the franchising authority needs to properly execute its responsibility to review transfer proposals. As stated in the House Report,

> [t]he Committee intends that the FCC regulations will be designed to ensure that every franchising authority receives the information required to begin an evaluation of a request for an approval of a sale or transfer . . . . The amendment is not intended to limit, or give the FCC authority to limit, local authority to require in franchises that cable operators provide additional information . . . with respect to a cable sale or transfer.

House Report at 120. The franchising authority should not be limited as to the type or quantity of information it may request, so long as the franchising authority reasonably deems all information requested necessary or appropriate for purposes of the transfer of control proceeding.

There are many possible types of information that a franchising authority may need to reach a decision in transfer of control proceedings. The legislative history identifies several broad categories of information which may be relevant to consideration of transfer requests: "[s]uch information <u>may</u> include detailed financial information showing the effect of the transfer or sale on rates and services; the contracts and agreements underlying the sale or transfer; information concerning the legal, financial and technical qualifications of the transferee; and information concerning the transferee's plans for expanding (or eliminating) services to subscribers." Id. (emphasis supplied). Thus, while Congress suggested the types of information that "may" be required, it did not foreclose the ability of the franchising authority to request additional information it deems relevant. Examples of additional categories of information relevant to transfer of control proceedings include information regarding the ownership and management structure of the transferee; the terms of any stock purchase agreements or options of controlling shareholders; the identity and structure of the parent and affiliates of the transferee; the nature and types of other outstanding obligations of the transferee and any guarantors of the transferee's performance; the sources and uses of funds for the transfer; the customer service practices of the transferee; and the transferee's plans for upgrading or modifying the system. Congress clearly intended that franchising authorities retain their rights to request and consider such information.

With regard to the 120-day limitation on the consideration of transfer requests, the statute plainly states that the time limit does not begin to run until all requested information has been received by the franchising authority. The franchising authority has an obligation to make an informed and reasoned decision with respect to transfer requests. As Congress recognized, the franchising authority cannot make a careful evaluation until it has all of the relevant information. Accordingly, the 120-day time period should begin to run only at such time as the franchising authority notifies the cable operator or the transferee that the information requested or required is sufficient for purposes of the transfer proceedings.

B. MMDS/SMATV Cross-Ownership Prohibition.

As Congress found, cross-ownership of different means of programming distribution provides incentives and opportunities to "engage in anticompetitive acts [that] raise prices and limit the types of services that are offered."[5] The Local Governments support the Commission's proposal to continue to apply its recently issued cable/MMDS cross ownership rules[6] and extend those rules to cross-ownership of cable and SMATV.

C. Subscriber Limits

Subscriber limits are important in preventing undue concentration in the cable industry. As Congress noted,

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[5] Senate Report at 46.

[6] See Second Report and Order, GEN Docket No. 90-54, 6 FCC Rcd. 6792 (1991).

"horizontal concentration provides incentives for MSOs to impede competition by discouraging the formation of new cable programming services." House Report at 42. Excessive concentration of ownership may make it difficult for new cable programming to be launched if a large MSO competing with the programmer controls enough of the market to ensure that the new programming will not be able to reach a large enough audience to succeed. The Local Governments believe that it is important for subscriber limits to be in place to prevent such anticompetitive practices.[7]

While there may be certain complex issues raised by requiring divestitures by current MSOs, Congress directed the Commission to impose subscriber limits because Congress believed that current MSOs have "excess market power." Id. Congress further found that such "monopsony power" could enable current MSOs to engage in practices which "restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction." Id. The logical implication of Congress' findings is that to adequately correct the market aberration caused by anticompetitive practices of current MSOs, such MSOs should be required to divest current

[7] The National League of Cities, one of the Commenters here, has adopted a policy that no single cable company and its affiliates should be permitted to serve more than 25 percent of the nation's cable subscribers.

holdings. This is consistent with the purpose and intent of the statutory directive to the FCC to adopt subscriber limits. The Local Governments suggest, however, that if divestiture is required, MSOs subject to such divestiture should be granted a rebuttable presumption that waiver of the 3-year holding period, following acquisition or initial construction, is appropriate.

The Local Governments also believe that subscriber limits should be set with reference to homes passed rather than by the number of subscribers. The number of subscribers receiving cable service is too variable to be a consistent indicator of horizontal concentration. The number of homes passed is a much more consistent figure, and would allow a more accurate assessment of the size of the market that is controlled by an MSO.

The Local Governments agree that periodic reviews of the subscriber limits are appropriate. However, given the rapid changes occurring within the cable television industry and the industry's continuing evolution, the Local Governments believe that it is more appropriate to conduct periodic reviews of the subscriber limits a minimum of every 3 years rather than every 5 years. Reviews should be conducted at least every 3 years to ensure that the subscriber limits do not quickly become obsolete due to changes in circumstances or technological developments.